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In the

Supreme Court of the United States

No. 975

October Term, [redacted] 1956

GILBERT PARNELL,
Petitioner,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner Gilbert S. Parnell prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above styled case on February 5, 1957.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is printed as Appendix A hereto, page 19, *infra*. A prior opinion of the Court of Appeals reported at 226 F. (2d) 297 was reviewed by this Court at 352 U. S. 29.

JURISDICTION

The judgment of the Court of Appeals was entered on February 5, 1957. Re-hearing was denied on March 12, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Whether, under Pennsylvania law, a "conduit" or intermediary in the process of transmitting bearer bonds to a Federal Reserve Bank for redemption is liable for conversion of the bonds handled.

STATUTES INVOLVED

Petitioner contends that no statutes are involved, the matter being governed by the common law of Pennsylvania as found in controlling judicial decisions of that State's Supreme Court. The Court of Appeals (erroneously, it is submitted) regarded section 59 of the Negotiable Instruments Law as applicable. That section reads:

"Every holder is deemed prima facie, to

be a holder in due course, but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." 56 Purdon's Statutes 139.

STATEMENT OF THE CASE

The facts of the case at bar are clearly stated in the first half-dozen paragraphs of the majority opinion of this Court at 352 U. S. 29. This Court there remanded the case to the Court of Appeals for determination in accordance with the law of Pennsylvania (under the *Erie* rule). The Court of Appeals thereupon, after argument, rendered the opinion here sought to be reviewed.

Recapitulating these facts for the convenience of the Court: Plaintiff in this case (Respondent here), a San Francisco bank, alleging diversity of citizenship, brought suit against four defendants, charging each of them with conversion of a number of bearer bonds which had disappeared on May 2, 1944, while the bank was getting them ready to present for payment. The bonds had been

called on May 1, 1944, but by their terms were due to mature on May 1, 1952. Under Treasury Regulations they were treated as government obligations, and were payable at any Federal Reserve Bank.

One of the four defendants, petitioner Parnell, senior partner in a country law firm at Indiana, Pennsylvania, was consulted in September, 1948, by one Rocco, the other individual defendant. Rocco's family had been clients of Parnell's firm, and Rocco sought advice regarding establishment of an automobile distributorship and a coal stripping operation. For these ventures he stated that he wished to turn some bonds into cash, and requested Parnell to handle the transaction at the First National Bank in Indiana, of which Parnell was a director. This bank was the third defendant in the case. It received the bonds from Parnell, and immediately sent them by registered mail to the Federal Reserve Bank of Cleveland (the fourth defendant), which as fiscal agent of the United States for the payment of such bonds effected such payment, in accordance with Treasury Regulations, by crediting the account of the bank in Indiana. That bank then issued Parnell a cashier's check for the amount collected (less a few dollars for expenses). Parnell cashed this

check at the bank and turned the proceeds in currency over to his client Rocco.[1] Subsequently[2] it was learned that these bonds were among those which had disappeared from the plaintiff's bank in San Francisco in 1944.

The trial court dismissed the action against the Federal Reserve Bank. A verdict was rendered against the other defendants. Rocco did not appeal. By a four to three decision, the Court of Appeals reversed, directing entry of judgment in favor of the Bank in Indiana and a new trial in the case of Parnell. This Court remanded the case for determination in accordance with the law of Pennsylvania rather than federal law. The Court

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[1] Parnell at some stage of his dealings with Rocco received a fee for his services (not for cashing the bonds, but for other services as an attorney). This fee was apparently paid out of the proceeds of bonds cashed. He says the amount was $650. (R. 317). According to Rocco, it was a larger amount. (R. 491-492). But this payment, whatever the amount was, took place *after completion of the transaction with respect to the bonds.* No other evidence tending to show bad faith on the part of Parnell is contained in the record.

[2] Parnell and the Bank had *no knowledge at all* of any irregularity in connection with bonds cashed for Rocco *until long after the completion of the transactions.* The bonds were delivered by Parnell to the Bank on September 28, 1948, and October 25, 1948. Myers, an F. B. I. agent, testified that he first called at the Bank regarding these bonds on January 14, 1949 (R. 381). He said he had called on Parnell regarding other bonds from Rocco on November 5, 1948 (R. 375). Parnell could not remember the date of the agent's visit (R. 487). According to his recollection and that of the Bank's cashier, the matter was discussed in January or February of 1949 (R. 308, 345-346, 353, 485). In any event, the notice was received *long after the completion of the transactions in this case.*

of Appeals, after argument, affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

I—Conflict With State Law

The formal provisions of Rule 19 (b) relied upon to sustain issuance of the writ are that the Court of Appeals "has decided an important state . . . question in a way in conflict with applicable state . . . law" and "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

The substantive public interest and importance of a correct decision of the issues involved in the case flow from the disastrous consequences to the banking system and the investing public which would result from the decision below.

Not only will the individual bank and lawyer involved in the instant case be subjected to a liability of approximately $60,000 by reason of extending a courtesy to a customer and client, but if liability for conversion of bonds transmitted for redemption can be imposed on the basis of such flimsy evidence, banks will be obliged out of caution to discontinue their "conduit" service in connection with redemptions; and this would mean that every holder of maturing government coupon bonds would be required to present them directly

to the Treasury at Washington or at one of the 18 Federal Reserve Banks located in large cities throughout the nation.

Public policy would clearly seem to require that adequate protection against liability for conversion should be accorded to "conduit" banks, so that they can continue to afford their patrons, in rural as well as in a few metropolitan areas, the customary banking facilities for presenting government bonds in due course for redemption.

Since the rule applicable in the case at bar, being State law, would also apply to transactions in corporate, municipal, and other types of coupon bonds besides government issues, the paralysis of commerce and banking resulting from acceptance of the decision below would be even more widespread and disastrous.

If protection from liability for conversion is to be accorded only to parties having the status of "holder in due course" a "conduit" bank could never receive immunity. For the statutory definition of holder in due course (56 P. S. 132) includes the requirement of giving value. *But a "conduit" bank never gives value.* It never invests its own funds in the purchase of bonds handled. When it receives the bonds from its customers, it pays out nothing. After collection it merely disburses the proceeds it has collected. It never could be exempted from liability for conversion if such protection depends upon enjoying the status of holder in due course.

The common law of Pennsylvania accords protection from liability for conversion to "conduit" parties acting in good faith, without requiring them to establish their status as holders in due course. The leading case which establishes this proposition and governs the case at bar is *First National Bank* v. *Goldberg,* 340 Pa. 337 (1941). The facts in *Goldberg* are on all fours with the case at bar.[3]

In the *Goldberg* opinion the Supreme Court of

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[3] Only four differences (all immaterial) can be discerned in the facts of the case at bar when compared with *Goldberg*. (1) The bonds in *Goldberg* were corporate and municipal, not government issues. But they were negotiable bearer bonds, and any question of different treatment of the bonds in the case at bar because they are government obligations has been eliminated by this Court's decision. (2) The bonds in *Goldberg* were sold on the market rather than forwarded for redemption. But the immunity from liability for conversion accorded to the selling bank in *Goldberg* would apply *a fortiori* to a bank forwarding for redemption. For a sale certainly displays greater resemblance to "unauthorized exercise of dominion over the property of another" than collection of proceeds when a bond has matured. (3) Apparently in *Goldberg* the conduit bank's services were entirely gratuitous. In the case at bar the Bank deducted a few dollars for expenses. Parnell, like Goldberg, received a fee, not for services in connection with cashing the bonds but for legal advice regarding other matters; but apparently Parnell's fee was paid from proceeds of the bonds, and it does not appear whether that was so in the case of Goldberg's, though it may well have been. But even if a conduit party collects compensation for services in connection with the handling of the bonds themselves, he is not liable for conversion. The test is good faith, not whether the transaction was gratuitous or gainful. 340 Pa. at 342. (4) The bonds in *Goldberg* had been stolen from the plaintiff bank by armed robbers. The bonds in the case at bar simply disappeared from plaintiff's place of business under mysterious circumstances.

Pennsylvania, speaking through Mr. Justice (later Chief Justice) Horace Stern,[4] said:

> "Apart from the authorities cited,[5] it would seem clear that no liability should be imposed on agents or brokers acting innocently in such cases. The bonds, being negotiable, pass by delivery, and the transferee to whom they are sold, who takes them for value and in good faith, obtains a good title as against the real owner: *Cochran* v. *Chase Bank,* 209 Pa. 34, 58 A. 117; *Porter* v. *Levering,* 330 Pa. 392, 397, 199 A. 482, 484. It would seem strange if

[4] Now of counsel for the First National Bank of Indiana on its petition for certiorari in this case, since his retirement and return to private practice.

[5] The Court had cited (p. 342) important authorities from other jurisdictions: *Pratt* v. *Higginson,* 230 Mass. 256 (1918) accorded protection to conduit parties in a case involving government and public utility bonds, even though compensation was received for effecting the sale. In New York, the highest Court of that State, on which Chief Judge (later Mr. Justice) Cardozo and other eminent judges then sat, spoke to the same effect in *Gruntal* v. *U. S. F. & G. Co.,* 254 N. Y. 468 (1930).

The Court also cited Restatement, Agency sec. 349, comment g, and Torts Sec. 233, sub-section 4 in support of the same view; and noted that apparently the only case to be the contrary is *Kimball* v. *Billings,* 55 Maine 141, 152 (1867), but there the agent who sold the bonds still held the proceeds (pp. 145-50); *Smith* v. *Harlow,* 64 Maine 510, 516-17 (1874).

In addition to the authorities cited by Mr. Justice Stern, mention might be made of the current trend toward relieving an auctioneer or carrier from liability for conversion, even in the case of chattels. Warren, *Trover and Conversion* 90-92 (1936); *U. S.* v. *Matthews,* 139 F. Supp. 683 (N. D. Calif. N. D. 1956). Cf. Holmes, *The Common Law,* 83 (1881)

> the broker, who is thus the conduit of a valid title, should be held responsible for a conversion although he acted in the same good faith as the purchaser. In the present case, *defendants did not part with value for the bonds,* but they do not claim any right, title or interest therein as holders; they derived no benefit from the transactions, acting merely as agencies to place the bonds in the hands of brokers for sale and to transmit the proceeds in return. The purpose of the Negotiable Instruments Law is to enhance the marketability of such securities and to allow bankers, brokers and people generally to trade in them with confidence. That object would be defeated if liability were to be imposed upon one who, mistakenly but in good faith, deals with negotiable instruments on the assumption that they belong to the person who employs him to effect their sale through ordinary market channels." 340 Pa. at 342-3. Italics supplied.

It will be noted that the ruling in the *Goldberg* case relieving conduit parties of liability for conversion is declared by the Pennsylvania Supreme Court in the *Goldberg* case *as a matter of the substantive common law of the State. It is not derived from statutory interpretation of the Negotiable Instruments Law.*

If the statutory definition of a holder in due

course (section 52 of the N. I. L., 56 P. S. 132) containing the requirement of taking for value were applied, of course the conduit parties could not have been relieved of liability for conversion.

But the Supreme Court expressly held that such parties were protected against liability for conversion, even though, as Mr. Justice Stern points out, in the above quoted extract, *they "did not part with value for the bonds"* (p. 343).

The *Goldberg* rule is thus a rule of Pennsylvania common law, independent of statutory enactment, and not derived from or based upon any provision of the Negotiable Instruments Law. But the courts below, contrary to the law of Pennsylvania, treated section 59 of the Negotiable Instruments Law as applicable.

The trial court ruled that the "conduit" bank had the burden of proving its status as "holder in due course" of the bonds involved in the case. That concept includes, *inter alia,* proof of giving value. The trial judge said "Had they been purchased for investment, for this bank's portfolio, then I would have agreed with you" and would have granted a directed verdict in favor of the Bank (R. 402. See also R. 222, 228, 230, 235, 260, 264-65, 404-5, 420-22, 446).

Likewise the Court of Appeals, in the opinion now sought to be reviewed, held that "the burden is on that bank [the "conduit" bank, First National Bank in Indiana] to prove *that it was a*

holder in due course." (P. 25, *infra,* Italics supplied).

We submit that the public interest requires, and the Pennsylvania law provides, that if a purchasing bank would be protected, a "conduit" bank should be protected *a fortiori.*

Any other rule would paralyze the banking system and clog the normal channels of commerce. It would be utterly irrational and impracticable to hold a bank which merely acted as an agency for the transmission of bonds and disbursement of the proceeds collected to a higher standard of care and diligence than is required of a bank which occupies the status of a prospective purchaser of such bonds for investment. Reason and logic dictate that the investor should be held to a stricter standard than the mere instrumentality of commercial intercourse, if there is to be a distinction. A contrary rule would be absurd and disastrous. A "conduit" bank is entitled to protection *a fortiori* in a situation where a purchasing bank would be protected. The rulings below were clearly wrong.

It is the established public policy of Pennsylvania law to accord extensive protection to banks, and to relieve them from liability in connection with transactions handled in the normal course of business. This is shown not only by the *Goldberg* decision but by other statutes mentioned in that opinion relating to banks (340 Pa. at 340-41).

In a Pennsylvania court a bank could never be subjected to liability on the basis of the evidence in this record. A Pennsylvania tribunal would hold, as in the *Goldberg* case, that from the evidence in the record "no inference of bad faith on the part of either defendant can be drawn" and that the Court should declare "as a matter of law that the facts conclusively establish the innocence of the defendants in the transactions" (340 Pa., at 340, 341).

The *Goldberg* case likewise makes plain that under Pennsylvania law liability cannot be based merely upon the existence of suspicious circumstances! "To defeat the rights of one dealing with negotiable securities it is not enough to show that he took them under circumstances which ought to excite the suspicion of a prudent man and cause him to make inquiry, but that he had actual knowledge of an infirmity or defect, or of such facts that his failure to make further inquiry would indicate a deliberate desire on his part to evade knowledge because of a belief or fear that investigation would disclose a vice in the transaction." In other words "the test is not care but good faith" (340 Pa. at 340).

Measured by this test, prescribed by Pennsylvania law, it is clear that the Court of Appeals has not disposed of this litigation as a Pennsylvania court would have done. The Court of Appeals regards it as sufficient that "The circumstances with regard to the negotiation were such

as to arouse some suspicion." (The Court concedes that "These items, of course, are not conclusive.") (P. 25, 26 *infra*).

If banking institutions in the important commercial State of Pennsylvania can be held liable for conversion on such flimsy inferences and such unsubstantial evidence, the public policy of that Commonwealth in favor of according extensive protection to the banking system and the security of transactions will be subverted.

From the foregoing it seems clear that the Court of Appeals has decided an important question of State law in a way which conflicts with the substantive common law of Pennsylvania as declared by the Supreme Court of that Commonwealth.

II—Denial of Fair Trial

But in any event Parnell and the Bank were denied a fair trial when the judge's charge placed them in a different and worse position than their co-defendant Rocco.

Although at the time this case was tried Rocco had been convicted of interstate transportation of stolen property and the jury could see him sitting in the courtroom in the custody of deputy marshals, *there was no testimony of record to show actual knowledge or bad faith even with respect to Rocco.* Plaintiff at one time contemplated offering the indictment and sentence of Rocco as

proof of knowledge by Rocco that his title to the bonds was defective (R. 202), but upon reflection the offer was withdrawn, as a matter of trial tactics (R. 251).

So, the trial judge charged the jury that with respect to Rocco the presumption that he was a holder in due course remained in effect, and that the burden of proof rested upon the plaintff throughout the case insofar as Rocco was concerned (R. 422).

But with respect to Parnell and the Bank in Indiana the trial judge charged that the burden of proof had shifted to defendants. The jury was told that they were obliged "to exculpate themselves from any charge of any dishonesty."

This unjustifiable discrimination was extremely injurious to petitioners. There was no justification for according to Rocco a more advantageous status than the conduit parties who merely transmitted the bonds on his behalf for redemption.

When the jury was told that the convict Rocco was presumed to have been acting in good faith but that Parnell and the Bank in Indiana occupied a less favorable status than Rocco and were obliged to vindicate themselves from the imputation of bad faith, how could the jury be expected to return a verdict that would be fair to appellants?

If Section 59 of the N. I. L. had any bearing on the case at all, it applied with equal force to

all three of these defendants. The trial court's unjust discrimination against Parnell and the Bank unquestionably injured them seriously.

The very terms of Section 59 itself accord to every holder the benefit of the title held by the "person under whom he claims." Likewise Section 58 (56 P. S. 138) provides that "a holder who derives his title through a holder in due course, and who is not himself a party to any fraud or illegality affecting the instrument, has all the rights of such former holder in respect of all parties prior to the latter."

How then could the conduit parties, the petitioners Parnell and the Bank, have a status inferior to that of Rocco, from whom their claim was derived?

This discrimination against Parnell and the Bank amounts to such a departure from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision.

III—No Substantial Evidence

Likewise extraordinary and calling for correction is the action of the Court of Appeals in reaching a different result in its second opinion although the facts and evidence are exactly the same as before.

In its earlier opinion the Court of Appeals

said: "As far as the Indiana Bank is concerned, we do not think there was any evidence of bad faith." Payment in bills of small denomination (which were all that the Bank had on hand in the normal course of business) and telephone calls to Parnell when the proceeds of the redeemed bonds were available (an ordinary courtesy) were the only circumstances on which a finding of lack of good faith could be bottomed. These were not enough. "Accepting these facts as we have outlined them, we do not think they show any bad faith on the part of the Indiana bank." (226 F. (2d) at 300).

The contrary conclusion in the decision now sought to be reviewed is based upon precisely the same two circumstances: small bills and phone calls. (P. 25, *infra*).

A verdict and judgment based on such flimsy inferences and unsubstantial evidence would not be permitted by a Pennsylvania court to stand, even though the Bank and Parnell have the burden of proof on the issue of good faith.

For the Court of Appeals to change its prior holding without any new or substantial evidence to support its action is a departure from the nor-

mal course of judicial procedure calling for correction by exertion of this Court's supervisory power.

Furthermore, while not relying upon erroneous rulings on admissibility of evidence as a ground of certiorari, we reserve the right to argue those points if certiorari is granted. We challenge the questionable assumption of the Court of Appeals (p. 29, *infra*), that "one may seriously doubt whether" an exhibit on the letterhead of the FBI, "had any significance at all" when it got to the jury. These rulings on evidence, if erroneous, were undoubtedly harmful.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

EDWARD DUMBAULD
Counsel for Petitioner

April, 1957.

APPENDIX A

Opinion

By Goodrich, Circuit Judge.

These cases are before this Court on remand from the Supreme Court of the United States, 352 U. S. 29 (1956). The original suit was brought to recover the proceeds of certain bonds guaranteed by the United States and alleged to have been stolen from the plaintiff. It was further alleged that the bonds were paid by the Federal Reserve Bank of Cleveland to the defendant, First National Bank in Indiana, Pennsylvania, which in turn paid the proceeds to the defendant, Parnell, who in turn turned over all or part of the money to the defendant, Rocco. The Federal Reserve Bank of Cleveland was also an original defendant but was dismissed during the litigation. Rocco had judgment given against him but did not appeal. At the trial in the district court judgment was also given against Parnell and the Indiana Bank. When the case came to this Court the judgment was reversed, 226 F. 2d 297 (1955).

The case was heard by the full court which divided four to three. The difference between majority and minority was with regard to whether federal or state law applied as to the burden of proof to establish one a holder in due course of a negotiable instrument. The majority of the court thought that *Clearfield Trust Co.* v. *United*

States, 318 U. S. 363 (1943), required the application of federal law and that the federal rule differed from that in Pennsylvania. The minority believed that since this was but an action between individuals, in which the United States was not concerned, the state law controlled. The Supreme Court, in holding that the *Clearfield* case did not apply, said:

> "The present litigation is purely between private parties and does not touch the rights and duties of the United States. The only possible interest of the United States in a situation like the one here, exclusively involving the transfer of Government paper between private persons, is that the floating of securities of the United States might somehow or other be adversely affected by the local rule of a particular State regarding the liability of a converter. This is far too speculative, far too remote a possibility to justify the application of federal law to transactions essentially of local concern." 352 U. S. at 33, 34.

I—The Pennsylvania Law

The governing statute at the time the transactions herein took place was the Negotiable Instruments Law. The bonds were bearer paper. Under the statute one who is in possession of negotiable paper payable to bearer is a holder. *Negotiable Instruments Law,* 191; Pa. Stat. Ann. tit. 56, 492 (Purdon 1930). Rocco, Parnell and the

Indiana Bank were all holders under this definition. Not only that, but they were persons to whom the instrument had been negotiated. Section 30 of the Negotiable Instruments Law states:

> "An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery." Pa. Stat. Ann. tit. 56, 81 (Purdon 1930).

Now we come to the provision of the law that contains the controlling language for this case. That is Section 59 of the Negotiable Instruments Law and here is the appropriate section as it appear's in Purdon's:

> "Burden of proof when title is defective.
> "Every holder is deemed *prima facie,* to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title." Pa. Stat. Ann. tit. 56, 139 (Purdon 1930).

This section has been applied in almost innumerable law suits, as an inspection of any one of

the books on the Negotiable Instruments Law will show. The point is made on behalf of the defendants that in this case we have an action for conversion of stolen instruments and not a suit against one of the parties thereon. The argument is pressed that the cited section refers to actions on the instrument only and not to such a case as this. *Filosi* v. *Crossman,* 111 Conn. 178, 149 Atl. 774 (1930), is cited in support of this argument. The language of Chief Justice Wheeler does support it.

But we are dealing only with Pennsylvania law in this particular phase of the inquiry. In *Schultheis* v. *Sellers,* 223 Pa. 513, 72 Atl. 887 (1909), Mr. Justice Mestrezat pointed out that almost a century before that:

> "* * * it was held, in an action on a promissory note, that the holder was required to show the consideration he paid for it and how it came into his hands, where the defendant proved that it was put into circulation fraudulently. This rule has been recognized and enforced in subsequent decisions." 223 Pa. at 516, 72 Atl. at 888.

The quotation just made is applicable to a suit upon the instrument and does not precisely meet the defendants' point. But *First National Bank of Blairstown* v. *Goldberg,* 340 Pa. 337, 17 A. 2d 377 (1941) does meet it. Mr. Justice Stern says for the court:

> "It was incumbent upon plaintiff to

> prove only its ownership and loss of the bonds, and the burden would then have shifted to defendants to show that they came into possession of the securities under such circumstances as to relieve them from liability for a conversion." 340 Pa. at 340, 17 A. 2d at 378.

In the Goldberg case the court came to the conclusion that under the proof the defendant was entitled to judgment. But the application of the law seems to us very clear. The discussion in the opinion referring to the Restatements of Agency and Torts, on which the appellants rely, is all based on the hypothesis of the good faith of the defendants in handling a negotiable instrument.

Again in *Brubaker* v. *County of Berks,* 381 Pa. 157, 112 A. 2d 620 (1955), we have the rule of the Negotiable Instruments Law applied in a case where the suit was not upon the instrument. The same application of the status was made as in the *Goldberg* case.

We find no difficulty in determining Pennsylvania law which is in accord with the majority rule prior to the Negotiable Instruments Law and the overwhelming weight of authority since. The burden of proof set out in Section 59, above quoted, is applicable in this case.

II—The Case for the Jury

As to Parnell, let us quote from the majority opinion when the case was here before. It will be

remembered that the majority were going on the theory that the plaintiffs, not the defendants, had the burden on the issues of good faith and lack of value. Nevertheless, the Court said (as to Parnell):

> "There was evidence which, if believed, would sustain the jury's verdict that he acted in bad faith. From Rocco's testimony, the jury could have inferred that Parnell's fee for cashing the bonds was extremely high, being approximately ten per cent of the value of the bonds. A fee of five or six thousand dollars for the mere transmittal of bonds for redemption would be sufficient evidence from which a jury could find bad faith." 226 F. 2d at 302.

With the burden of proof upon Parnell, not the Bank of America, the result is *a fortiori*.

As to the Indiana Bank, we think that there is enough evidence to support the jury's verdict, remembering that the burden is on that Bank to prove that it was a holder in due course. The Bank's then cashier admitted that he knew that the bonds had been called. The circumstances with regard to the negotiation were such as to arouse some suspicion. The two batches of bonds were concerned and one earlier had been collected by the bank on behalf of Parnell. Each time notification was given him by telephone by the same bank cashier. Each time he received a cashier's check and proceeded to cash the check in small

bills forthwith. These items, of course, are not conclusive.

But it is to be remembered that the burden is on the bank. Its then cashier testified that he had no notice of any defect of title. His memory was vague on many surrounding circumstances concerning the transactions. That in itself is not enough to prove him dishonest since the transactions occurred some time before trial. But the jury saw the witness and heard his testimony. They had the fact, introduced in rebuttal, that he had been convicted of a felony of embezzlement. This was introduced without fanfare and whether it influenced the jury's consideration of his testimony we cannot know. The jury was not compelled to believe this bank officer. We have reread the testimony on this point. It does not justify setting aside a verdict against the party who had the burden establishing good faith and lack of notice.

III—Joint and Several Tortfeasors

At the first hearing of the case here the defendant bank raised the question of liability under Pennsylvania law of joint and several tortfeasors. This point was taken up in the dissenting opinion but not covered by the majority opinion since the majority was not called upon to decide it. The Supreme Court, however, has sent the case back here to determine the undecided points. And so we repeat pretty largely what was said in the dissenting opinion.

Defendant bank asked for an instruction to the effect that the plaintiff could not have a verdict against more than one of these alleged converters. This instruction was refused and it claims error. We think the bank is incorrect. The general rule with regard to the liability of several persons in such an action as this is that the satisfaction of the judgment against one precludes proceeding against another. This is the rule as it appears in the Restatement, Torts, 886; Restatement, Judgments, 95, and this is the rule as it is generally applied in Pennsylvania. *Union of Russian Societies of St. Michael & St. George, Inc.* v. *Koss,* 348 Pa. 574, 36 A. 2d 433 (1944). There is some early authority in Pennsylvania that seems to indicate in actions for conversion that the securing of a judgment against one alleged tortfeasor has the same effect. See, *e.g., Hyde* v. *Kiehl,* 183 Pa. 414, 38 Atl. 998 (1898). These cases are not new and the authorities above cited announce the present-day rule. Whether the older cases represent the present law of Pennsylvania is doubtful. See Goodrich-Amram, Pennsylvania Procedural Rules Service, 2229 (b), 2232 (f)-1 (1940). But even then they do not go so far as to preclude a verdict against more than one defendant. It might well be, if they were still effective, that a plaintiff would have to elect, before judgment was entered, which defendant he wanted to pursue. There is, we conclude, no merit in this point made by the defendant.

IV—Certain Objections to Evidence

The defendants claim prejudice when the trial judge refused to allow them to show the remarks of the sentencing judge at the time the bank cashier was convicted. This is not a proper subject for complaint. The extent to which a witness may be rehabilitated after his credibility is attacked by showing that he has been convicted of a felony is a matter in which the trial judge has, and must have, wide control. *United States* v. *Boyer,* 150 F. 2d 595 (D. C. Cir. 1945.)

There were certain exhibits to which objection was made. These consisted of a notice sent out by the Federal Reserve Bank of San Francisco to the Pittsburgh Branch, Federal Reserve Bank of Cleveland and a copy of a notice circulated by the Federal Bureau of Investigation in the area of the Pittsburgh Branch of the Federal Reserve Bank of Cleveland. It is not claimed that any of these reached the Indiana Bank so as to charge it with the knowledge which these notices contained. The judge limited their use to the establishment of the loss by the plaintiff and that notices of the loss went out through banking channels. This was not error. The analogy of the "hue and cry" immediately suggests itself. And we think that the fact of a notice being broadcast in the bank's vicinity is admissible on the question of whether the bank may have had some knowledge.

The lack of possible harm from these exhibits even if the judge was too lenient in admitting them is observed when one reads the interminable colloquy which preceded their admissions. At least six lawyers were involved and questions and objections came with rapid-fire frequency. One may seriously doubt whether the documents had any significance at all as they got to the jury. Nothing was said about them in the judge's charge and no one asked the judge to say anything more than he did on the point. It seems clear to us going through the record of a vigorously contested trial that instances of this kind are swallowed up in the sum total of the testimony and have no significance until lawyers examine the record to find error.

The case was technical. The Trial judge instructed the jury fully and accurately. The jury has reached a permissible conclusion

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

FILED
MAY 9 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 975

GILBERT A. PARNELL, Petitioner

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The statement of the case by petitioner (Petition 4-5) is considered substantially deficient in that it fails to reflect the nature of, and the conflicts in, the testimony relied upon to establish that the petitioner acted honestly, innocently and in good faith.

The facts shown by the printed record, which consists of approximately five hundred pages, are stated in the respondent's brief in opposition to the petition for a writ of certiorari filed by the First National Bank in Indiana, Pennsylvania, at No. 888, and need not be

restated in detail here. We repeat, however, a portion of what was said at page 3 of that brief:

> "The defendants' attempt to prove their good faith was based almost entirely, if not exclusively, on the testimony of Parnell and of the bank's cashier. The credibility of the defendant Parnell was impeached by his own prior inconsistent testimony in another proceeding (R. 472-478) and also by the testimony of an F.B.I. Agent (R. 319, 371-375) and of the defendant Rocco (R. 482-483, 489-492). The testimony of the cashier, Straitiff, is conflicting in itself (R. 345-346) and also in conflict with the testimony of F.B.I. Agent Myers (R. 345, 353, 381). His credibility was impeached generally by the introduction of the record of his conviction of embezzlement from the defendant bank (R. 390-393)."

It may not be inappropriate to point out also that the instant petitioner's statement (Petition 5) that Mr. Parnell received a fee for services and "not for cashing the bonds" and that the fee was $650 or "a larger amount" is hardly a clear statement of the evidence which was presented to the jury. The petitioner testified that he received $650, as a retainer and fee for legal services, and no other sums whatever (R. 317); but he was contradicted by the defendant Rocco, who testified that Mr. Parnell received, out of the proceeds of the bonds, five or six thousand dollars (R. 488-492). And the petitioners did not undertake to question Rocco by a single question of cross-examination (R. 493).

ARGUMENT

I.

The innocence and good faith of the petitioner was a jury question and the evidence insufficient to warrant setting aside the verdict.

The argument advanced in Points I (Petition 6-14) and III (Petition 16-18) proceeds throughout on the faulty premises that good faith is established as a matter of law, and without the necessity of leaving oral and conflicting testimony to a jury, if an adversary has not proved bad faith affirmatively.[1] The point wholly overlooked is that the jury was not required to accept the petitioner-defendant's protestations of innocence and good faith, particularly in view of the circumstances surrounding the transaction. The rule applicable here is as stated by the Pennsylvania Supreme Court in *Zenner v. Goetz,* 324 Pa. 432, 437, 188 Atl. 124 (1936), where, quoting from an earlier decision, the court said:

> ". . . in all our recent cases, we have consistently held that oral evidence relied on to overcome presumptions sufficient to take plaintiff's case to the jury, must be submitted to that body to determine as to the credibility of the witnesses, the inferences to be drawn from their testimony, and the

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1. Petitioner labored under no such misapprehension when the case was before the Court of Appeals originally. The petitioner's position then was, as is pointed out by Judge Staley in the opinion for the majority of the Court of Appeals in its first opinion, that Pennsylvania law was not applicable and that under Federal law "significantly different results would be reached" (226 F. 2d 297, 299).

facts to be found therefrom, unless the testimony in question, being clear, positive, credible, uncontradicted and indisputable, shows physical facts, or forms the basis for mathematical tests which demonstratively govern the case in defendant's favor."

The evidence offered did not convince the jury. The District Judge, who also saw the witnesses and heard the testimony, described the verdict as "just and proper under the evidence presented" (R. 447). The Court of Appeals has agreed, unanimously, that the verdict is a permissible one in view of the burden of proof resting on petitioner-defendant under Pennsylvania law. The facts having been so found, the case is not one for review here. Cf. *Comstock v. Group of Industrial Investors,* 335 U. S. 211, 214; and *Graver Tank & Mfg. Co. v. Linde Air Products Co.,* 336 U. S. 271, 275.

II.

There was no denial of a fair trial.

The instant petitioner claims (Petition 14-16) that he was denied a fair trial because the District Judge, rightly or wrongly, instructed the jury that the defendant Rocco did not have the burden of demonstrating his own good faith. In the first place, petitioner did not except to the charge (R. 431) and, secondly, petitioner at all times insisted that he should not be treated as claiming the rights of a holder in due course. The charge as a whole (R. 414-433) was eminently fair, and the fact that an isolated sentence may have been unduly favorable to another defendant cannot be said to have resulted in the denial of a fair trial to this petitioner.

CONCLUSION

The decision below involves solely a question of Pennsylvania law which has been decided correctly by the Court of Appeals. No question is raised by the petition which would warrant review by this Court.

Respectfully submitted,

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Reply of Petitioner to Respondent's Brief in Opposition to Certiorari.

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I

ON THE ENTIRE RECORD, THERE WAS NO SUBSTANTIAL EVIDENCE WARRANTING ANY INFERENCE OTHER THAN THAT OF THE CONDUIT PARTIES' GOOD FAITH IN TRANSMITTING THE BONDS FOR REDEMPTION.

Respondent's brief in opposition considers our statement of the case "substantially deficient in that it fails to reflect the nature of, and the conflicts in, the testimony relied upon to establish" the good faith of petitioner (Br. 1).

We find the same "substantial deficiency" in respondent's statement at No. 888, which he incorporates by reference, and particularly in the paragraph repeated at page 2 of his brief in opposition herein.

Respondent there says: "The defendants' attempt to prove their good faith was based almost entirely, if not exclusively, on the testimony of Parnell and of the Bank's cashier."

This is entirely incorrect. Substantially all of the circumstances proving defendants' good faith were proved by plaintiff's own case. Much of this evidence was documentary. The evidence of the F. B. I. agent Myers, called by plaintiff, is also relied on strongly by defendants to prove their good faith.

It was not an unusual misfortune that plaintiff's own case fully disclosed the circumstances relieving defendants from liability. Plaintiffs frequently disclose during presentation of their own case circumstances destructive of their right to recover. For example, this often occurs where the plaintiff's own evidence reveals the existence of contributory negligence, an affirmative defense upon which defendant has the burden of proof: *Health* v. *Klosterman*, 343 Pa. 501, 503 (1941).

It must be remembered that the only difference between the federal law, relied upon by the ma-

jority of the Court of Appeals in its former opinion, and the State law of Pennsylvania, which this Court has determined governs the case, is with respect to incidence of the burden of proof. Under federal law, plaintiff would have that burden; under State law, the defendants.

To hold that defendants have the burden of proof certainly does not do away with or abolish the other familiar rule that a question cannot go to the jury unless, *upon the entire record,* there is testimony from which the jury could reasonably draw the inference sought to be drawn.

It does not matter whether defendants' witnesses or plaintiff's own evidence discloses the circumstances destructive of plaintiff's right to recover.

In this connection it must be remembered that the only burden upon defendants, under Pennsylvania law, is that described in the following quotation from the *Goldberg* case, upon which respondent so strongly relies (Br. at No. 888, p. 7):

> "It was incumbent upon plaintiff to prove only its ownership and loss of the bonds, and the burden would then have shifted to defendants to show that they came into possession of the securities *under such circumstances as to relieve them from liability for a conversion.*" (340 Pa. at 340, italics supplied).

Respondent, like the trial court and the court below, erroneously argues that Section 59 of the Negotiable Instruments Law was there applied in the *Goldberg* case (Br. at No. 888, p. 7).

Careful reexamination of the *Goldberg* opinion indicates that Section 59 of the N. I. L. is nowhere mentioned. Shepard's Citations under Section 59 of the N. I. L. does not list the *Goldberg* case. As we state at page 11 of our petition for certiorari, the *Goldberg* rule declares the substantive *common law of Pennsylvania,* independent of statute, and entirely apart from any provision of the N. I. L.

On the same page of the *Goldberg* opinion as the above quoted passage upon which respondent relies, the Court goes on to specify what is meant by "such circumstances as to relieve [defendants] from liability for a conversion."

The circumstances so specified are not the requirements of Section 59 and Section 52 of the N. I. L., but merely the circumstances of acting in good faith as a "conduit" party. This is the very essence of the substantive rule set forth in the *Goldberg* decision. The test is not care but good faith. To defeat the rights of one dealing with negotiable securities it is not enough to show that he took them under circumstances which ought to excite suspicion, "but that he had *actual knowledge* of an infirmity or defect," or of such

facts that his failure to make further inquiry would indicate a deliberate desire to evade such knowledge (340 Pa. at 340).

What then is the evidence in the record with respect to the "actual knowledge" of Parnell and the Bank in Indiana, on September 25, 1948 and on October 25, 1948, when the transactions involved in the case at bar occurred?

It must be emphasized that under applicable law defendants' rights depend upon their "actual knowledge" as of the date when the transactions took place, and not what they have since learned in the light of "hindsight" and subsequent revelations.

What did the testimony of F. B. I. Agent Myers show regarding these transactions? He testified that he first called on Parnell regarding the Home Owners Loan Corporation bonds involved in this case on January 8, 1949 (R. 377). He first called at the Bank in Indiana regarding these bonds on January 14, 1949 (R. 381).

These dates were long after the completion of the transactions on September 28, 1948 and October 25, 1948, respectively.

The first suspicious circumstances regarding bonds received from Rocco came to light in con-

nection with other bonds not involved in this case. These were $5,000 of United States Treasury bonds and $20,000 West Penn Power bonds. *They had been forwarded on September 10, 1948. Suppose that a reasonable inference might be made by a jury that Parnell and the Bank were chargeable with "actual knowledge" of defects in the Home Owners Loan Corporation bonds involved in this case from the date when they learned of a defect in other bonds coming from Rocco. Even if this unwarranted assumption be made, it does not benefit respondent, for the F. B. I. Agent's testi-

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* In this connection it should be mentioned that respondent's statement (Br. at No. 888, page 2) regarding the West Penn and Treasury bonds is not accurate. The "suspicious" circumstances (telephone calls to Parnell from the cashier and Parnell's cashing the check in bills of small denominations) upon which the Court of Appeals relies, were not applicable to the transactions in these bonds. When the proceeds of those bonds were received, Parnell was out of town and his partner Earl Handler obtained the money from the bank and turned it over to Rocco (R. 314-15).

The only pertinence of these bonds handled on September 10, 1948, to the case at bar is that the fact that they were paid in due course without any question being raised constitutes further evidence to confirm Parnell's good faith in his later dealings with the H. O. L. C. bonds involved in the case at bar.

In the ordinary course of business Parnell would expect that if there was anything wrong with any bonds or other items entrusted to a bank for collection, notification to that effect would be received, instead of the money. At the date of the transactions involved in the case at bar, the proceeds of the $25,000 of other securities previously forwarded for Rocco had been received in due course through the customary banking channels, with no questions raised. There was nothing to excite Parnell's suspicion when the H. O. L. C. bonds were brought to him by Rocco and Parnell's partner who was handling Rocco's legal work in the Parnell firm.

mony shows that it was not until November 5, 1948, that he called on Parnell regarding the $5,000 of Treasury bonds (R. 372, 375). Even if this date is taken as putting Parnell on notice, it falls several weeks after the completion of the last transaction with respect to bonds involved in this case (October 25, 1948).

We submit that the only reasonable inference to be drawn from the testimony of the F. B. I. Agent and from plaintiff's own case is that at the time of the transactions involved in the case at bar Parnell and the Bank in Indiana had no "actual knowledge" of any defect in the Home Owners Loan Corporation bonds delivered.

Respondent, erroneously assuming that defendants' good faith is shown only by the testimony of Parnell and of the Bank's cashier Straitiff, proceeds to argue that Parnell's testimony was contradicted by that of the F. B. I. Agent (Br. 2).

What is the extent of that contradiction? Parnell said that he first learned of the question regarding the Home Owners Loan bonds in "January or February of 1949" (R. 308); the F. B. I. Agent fixed the date as January 8, 1949 (R. 377). Such a trifling defect of recollection with respect to exact dates, regarding a collateral matter, certainly does not constitute testimony from which any inference of bad faith could be drawn.

II

DENIAL OF FAIR TRIAL

Respondent (Br. p. 4) endeavors to pass off as "an isolated sentence" in the trial court's charge the unjustifiable discrimination between defendant Rocco and the conduit parties whose title was derived from him.

This discriminatory treatment was not a mere isolated fragment of the charge, but a fundamental feature of the theory of the case entertained by the trial court, and repeatedly affirmed throughout the trial. (See record references in Petition p. 11.)

Perhaps the most striking statement of the trial court's erroneous theory is found (R. 264) in the court's disposition of the motion to dismiss made by the Bank in Indiana at the close of plaintiff's case:

> "That is the crux of this case. That is what we are confronted with, the ruling that is to be made on that, the plaintiff having rested. I say very frankly, if you were a holder in due course for value, at this stage of the record, with the proof at hand, your position would be correct. I think you would be entitled to a dismissal."

This erroneous theory, that Section 59 of the Negotiable Instruments Law required defendants to prove that they were holders in due course, thus

not only resulted in unjust discrimination between Rocco and the conduit parties, but also induced the Court to deny the Bank's motion to dismiss.

This error was therefore certainly extremely harmful and detrimental to petitioners. It was a basic feature of the trial court's thinking, and cannot be shrugged off as "an isolated sentence" in a charge otherwise fair to the parties. It colored the court's action throughout the entire case.

And the trial court's theory is undeniably error, under the law of Pennsylvania, since the very essence and heart of the point decided in the *Goldberg* case is that conduit parties are relieved from liability even *though they "did not part with value for the bonds"* (340 Pa. at 343, quoted in Pet. pp. 10-11).

CONCLUSION

Accordingly it seems clear that the court below misapprehended the law of Pennsylvania in a manner seriously detrimental to the rights of petitioner, in a matter of great importance to the administration of the banking laws and the financial policy of that State. Accordingly review by this Court is appropriate.

Respectfully submitted,

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